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### **Lisbon Treaty - Delegated and Implementing Acts**

**Report Categories:**

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**Report Highlights:**

On March 9, 2010, the European Commission presented its proposal on the exercise of implementing powers as required by Article 291 of the Lisbon Treaty. With the entry into force of the Lisbon Treaty, "Comitology" is being abolished and the implementation of basic legislative acts must be carried out through "delegated" and "implementing" acts.

## **General Information:**

# **EU DECISION-MAKING PROCEDURES: DELEGATED & IMPLEMENTING ACTS – A WORK IN PROGRESS**

## **INTRODUCTION**

The Treaty of Lisbon which entered into force on December 1, 2009, distinguishes between “legislative acts” and “non-legislative acts”. Legislative acts (framework legislation) are adopted under the ordinary or special legislative procedures and directly involve the European Parliament and the Council. For non-legislative acts (implementation of framework legislation), the Treaty makes a clear distinction between “delegated acts” and “implementing acts”. For detailed information see [GAIN Report E50015 “The Treaty of Lisbon – EU Decision-Making Procedures”](#).

The Lisbon Treaty puts the European Parliament and the Council on equal footing to decide in each basic legal act which type of power (delegated or implementing) should be conferred to the Commission. Under the previous Treaty, it was the Council that could confer implementing powers to the Commission. [Council Decision 1999/468/EC](#) established the procedures for the exercise of implementing powers via a so-called “comitology” system whereby committees composed of Member States experts oversee the implementation of framework legislation. With the entry into force of the new Treaty, Comitology is being abolished and the implementation of basic acts must be carried out through delegated and implementing acts.

The provisions in the Lisbon Treaty on delegated acts (Article 290) are sufficient in themselves and do not require any legally binding framework to make them operational. The provisions on implementing acts (Article 291) do not provide any role for the European Parliament and the Council to control the Commission’s exercise of implementing powers. As such controls can only be exercised by the Member States a legal framework is required to establish the mechanisms of such control. On March 9, 2010, the Commission published its [proposal](#) for a regulation “laying down the rules and general principles concerning mechanisms for control by Member States of the Commission’s exercise of implementing powers” ([COM\(2010\) 83 final](#)).

## **IMPLEMENTING ACTS - COMMISSION PROPOSAL**

On March 9, 2010, the European Commission presented its [proposal](#) on the exercise of implementing powers as required by Article 291 of the Lisbon Treaty. Primary responsibility for implementing EU laws lies with the Member States but a basic act must confer implementing powers to the Commission when there is a need for uniform implementing conditions. In the rationale for the proposal, the Commission explains that the proposal draws on Council Decision 1999/468/EC (Comitology Decision) and experience gained in implementing that Decision. The Commission proposes to maintain the Committee structure (composed of Member States experts and chaired by a representative representative of the Commission) set out in the Comitology Decision but foresees only two procedures: the advisory procedure (mirrors the existing advisory procedure) and a new “examination” procedure which would replace the existing management and regulatory procedures.

## Examination Procedure

The Examination Procedure will apply for the adoption of:

- Implementing measures of general scope
- Other implementing measures relating to common agricultural and fisheries policies
- Environment, security and safety or protection of the health or safety of humans, animals or plants
- Common commercial policy

For all other implementing measures, the advisory procedure would apply.

The Examination Procedure would function as follows:

- The committee delivers its opinion on a draft measure by a qualified majority (currently 255 votes out of 345)
- If the committee delivers a **positive opinion**, the Commission **shall** adopt the draft measure (unless exceptional circumstances or new elements would justify the measure not being adopted)
- If the committee delivers a **negative opinion**, the Commission **cannot** adopt the draft measure. The chairperson of the committee can re-submit the draft measure to the committee for a second deliberation or submit an amended version of the draft measure. In exceptional circumstances, the Commission can adopt the draft measure despite a negative opinion but in such case the committee would have the last word within a time-period which will not exceed one month.
- If **no opinion** is delivered, the Commission **may** adopt the draft measure. The Commission ultimately decides whether to adopt the measures or not taking into account the positions expressed within the committee. If the Commission does not adopt the draft measure, the chairperson may submit an amended version to the committee.

A special procedure is foreseen for the adoption of emergency measures.

A significant change compared to the current Comitology Decision is that there would no longer be an obligation for the Commission to adopt draft measure where neither a qualified majority in favor nor a qualified majority against is reached (no opinion). Under the regulatory procedure set out in the Comitology Decision, the Commission is required to adopt draft measures on which the committee is unable to deliver an opinion and the Council, acting as an appeal body, does not take a decision (this is how all biotech events got approved in the EU). This obligation would be abolished with the adoption of the new regulation. The Commission would be completely in charge as proposals would no longer be referred to the Council and there would be no institutional role for the EP.

## Register

The European Parliament and the Council do not play a role in the control of the exercise of the implementing powers by the Commission but will have full access to all committee documents

through the continued use of the existing Comitology register which would be adapted to the new procedures. Public access to information on committee proceedings would still be limited to references of documents only.

### **Adaptation to the new system**

The Commission proposes an automatic alignment of existing legislation to the new procedures, i.e. all all references to “traditional” Comitology procedures EXCLUDING the regulatory procedure with scrutiny set out in Article 5a of the Comitology Decision would be understood as references to the corresponding procedures of the new regulation. The Commission proposes this approach to avoid old and new procedures running in parallel and having to align the *acquis* act by act or through omnibus regulations. The regulation would not affect pending procedures in which a committee has already delivered an opinion in accordance with the Comitology Decision.

It is not clear yet how this would work for so-called “borderline” issues, i.e. basic acts which include references to “traditional” Comitology procedures but also seem to meet the conditions set out for delegated acts.

### **Next Steps**

The Commission proposal on implementing acts has to be adopted under the ordinary legislative (co-decision) procedure. The proposed date of entry into force is October 1, 2010. If adopted, the new regulation would repeal Council Decision 1999/468/EC (Comitology Decision) but the effects of Article 5a (regulatory procedure with scrutiny) of the repealed Decision would be maintained for the purpose of existing basic acts making reference thereto. The three institutions have decided - as an interim solution - that the old Comitology system (with the exclusion of the regulatory procedure with scrutiny) would exceptionally continue to apply until the new regulation on implementing acts is adopted. The European Parliament insists on including a recital in pending legislative proposals that would stress the exceptional and interim character of the solution agreed.

### **DELEGATED ACTS**

Although the terms used in Article 290 of the Lisbon Treaty to define “delegated acts” are similar to those used to define the “regulatory procedure with scrutiny (RPS)” in Article 5a of the Comitology Decision, i.e. quasi-legislative acts of a general scope that supplement or amend certain non-essential elements of legislative acts, delegated acts are a novel concept. In contrast to Article 291 on implementing acts, Article 290 on delegated acts does not require the adoption of a binding legal framework to set out the rules.

Instead of using a “one-size-fits-all” procedure, the European Parliament and the Council will in each basic act jointly set the conditions (objectives, content, scope, duration) for the delegation of power. The Commission has complete control as it no longer needs to obtain an opinion of a committee made up of Member States experts before submitting a proposal to the European Parliament and the Council. A Commission proposal for a delegated act may be adopted only if no objection has been raised by one of the legislators within a time period set by the basic act. Where before the Comitology Decision set out criteria for the European Parliament’s right of opposition, Article 290 does not

provide for such limitation and puts both legislators on equal footing.

Also new is the “right of revocation”. The European Parliament or the Council may decide to revoke the delegation of power. An agreement between both legislators is not necessary to revoke the delegation or to object to a delegated act. An objection from either would prevent it from entering into force. The right of veto now intervenes after the adoption of the delegated act by the Commission with the objective to block its entry into force where previously under the RSP Comitology procedure the veto blocked the adoption of a proposal by the Commission.

The three institutions are working on an inter-institutional agreement to define a general framework within which the delegation of power would operate. In December 2009, the Commission published its [“Communication on the implementation of Article 290 of the Lisbon Treaty”](#) and the [Council released its report on the implementation of Article 290](#). The European Parliament’s Legal Affairs Committee has prepared a [draft report on delegated acts](#) which will be put to a vote at the end of April 2010. The final report will then become the Parliament’s position on delegated acts. The European Parliament has already indicated that it finds some elements proposed by the Commission and the Council problematic, in particular the inclusion of a recital on consultation of Member States experts during the preparatory phase. For urgent proposals in areas such as agriculture and the environment which cannot wait until the adoption of the European Parliament report, the Parliament is negotiating with the Council how the provisions on delegated acts should be worded.

Agreeing on a timeframe for the right of objection may become a new “battleground” between the institutions. The Commission is proposing a standard period of two months that may be extended by one month, the Council prefers a standard period of three months while the European Parliament favors a standard period of two months that may be extended by two months. In its recent opinion on the Council’s position on the novel foods proposal, the Commission insists on setting a two-month objection period because the Council did not sufficiently justify a three-month objection period.

#### **LINKS:**

- [European Parliament Draft Report on the Power of Legislative Delegation](#)
- [Commission Communication “Implementation of Article 290 of the Lisbon Treaty”](#)
- [Council Report “Implementation of the Treaty of Lisbon – Delegated Acts”](#)
- [Commission proposal on implementing acts](#)

#### **RELATED REPORTS:**

- [“The Treaty of Lisbon: EU Decision-Making Procedures” \(GAIN report E50015\)](#)
- [“The Treaty of Lisbon: Agriculture & Fisheries” \(GAIN report E48039\)](#)
- More information on the EU institutions can be found on our website at <http://www.fas.usda.gov/posthome/useu/institutions.html>.

